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Md Selim Reza Imran v Salim bin Daros & Anor

B HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12B-70–12 OF 2017
LIM CHONG FONG J
24 JULY 2018

C *Damages (Personal Injury or Death) — Road Accident — Appeal — Appeal against quantum of damages — Whether general damages awarded by sessions court judge for closed fracture right medical malleolus and right distal 1/3 fibula was too low — Whether appellant entitled to award of general damages for future medical expenses — Whether sessions court judge erred in finding that appellant* D *was illegally employed without valid work permit — Whether appellant entitled to general damages for loss of earnings and earning capacity — Whether appellant entitled to special damages for medical treatment in Dhaka, Bangladesh and travelling to Malaysia*

E There was a collision between motorcycle ridden by the appellant and a taxi driven by the first respondent which caused serious personal injuries to the appellant. The appellant sued the respondents for damages and the sessions court entered judgment in favour of the appellant. The appellant was dissatisfied over several heads of award of general and special damages, hence F the present appeal. There were four issues raised by the appellant: (a) under-award of general damages for closed fracture right medical malleolus and right distal 1/3 fibula ('the first issue'); (b) non-award of general damages for future medical expenses ('the second issue'); (c) non-award of general damages for pre-trial and post-trial loss of earning or earning capacity ('the G third issue'); and (d) non-award of special damages for medical treatment in Dhaka, Bangladesh and travelling to Malaysia ('the fourth issue'). With regards to the first issue, the appellant submitted that the award of RM30,000 was too low which ought instead to be RM45,000. For the second issue, the appellant contended that the general damages for future medical expenses ought to be H awarded as a matter of principle and logic because the learned sessions court judge ('the SCJ') had actually awarded the claim for pain and suffering for the future operation to remove the implant. In respect of the third issue, the respondents contended that the appellant had failed to furnish adequate documentary proof of his work permit at the material time of the accident I whereas the appellant submitted that he was working in Malaysia with a valid work permit. Furthermore, the appellant contended that his average take home salary for the last three months prior to the accident was RM2,926 inclusive of overtime and allowances. Lastly, with regards to the fourth issue, the appellant contended that the SCJ denied him the award of special damages for his

medical treatment in Dhaka, Bangladesh and travelling to Malaysia. A

Held, allowing the appeal in part with costs of RM6,000:

(1) With regards to the first issue, the court found that the award of RM30,000 in the circumstances particularly in view of the nature of the fracture as well as consequential disability was not manifestly low based on the good gracious litmus test to warrant appellate intervention (see para 12). B

(2) As for the second issue, the court agreed with the appellant's submission and concluded that the SCJ must have overlooked by not awarding it. Consequently, appellate intervention was warranted here, and the court further found that RM8,000 was a fair and reasonable compensation (see paras 14). C

(3) The SCJ had erred by having found that the appellant was illegally employed without a valid work permit. Since the permit was expressed as 'extended' and not 'issued', it necessarily meant that the appellant had a previous valid work permit, and this was corroborated by the testimony of his employer (see para 19). D

(4) The SCJ had provisionally computed the compensation for loss of earnings at RM1,090 x 136 = RM148,240 but the court found that the said computation was erroneous because it should instead have been done in two parts. The first part was the appellant's actual loss of earnings and the second part was his loss of future earning capacity. The computation for the first part should be for ten months from July 2015–May 2016. Since the appellant had been paid a month salary as conceded by him, the multiplier was hence for nine months. The multiplicand should fairly be RM2,926. Hence, the court awarded RM26,334 for loss of earnings. For loss of earning capacity, it had been customary of the courts to make lump sum award particularly where there was inherent uncertainty on the nature of future employment prospects of the plaintiff. The court thus awarded RM100,000 for loss of earning capacity (see paras 20–21). E F G

(5) The reception of evidence or otherwise due to late production was within the discretion of the trial judge procedurally and the appellate court would not interfere with that exercise of the discretion unless it was plainly wrong. In this regard, it must have been a ruling by the SCJ based on the relative prejudices to the parties and the court found that his ultimate decision was not plainly wrong. Further, the original documents that constituted the documentary evidence had not been tendered in the suit and the makers of the said documents were also not called. Alternatively, no explanation was given to justify their non-production as well. As such, it would also have been correct for the SCJ to have refused H I

admitting them in evidence. The appellant's claim with regards to the fourth issue was therefore without merit and rightly rejected (see paras 23 & 25–26).

[Bahasa Malaysia summary

Terdapat pelanggaran antara motorsikal ditunggang oleh perayu dan teksi yang dipandu oleh responden pertama yang menyebabkan kecederaan yang serius terhadap perayu. Perayu menyaman responden untuk ganti rugi dan mahkamah sesyen memasukkan penghakiman berpihak kepada perayu. Perayu tidak berpuas hati akan beberapa award utama ganti rugi am dan khas, maka rayuan ini. Terdapat empat isu yang dibangkitkan oleh perayu: (a) kurangkan award ganti rugi am untuk malleolus kanan tertutup dan bahagian kanan 1/3 fibula patah ('isu pertama'); (b) tiada award untuk ganti rugi am untuk perbelanjaan perubatan masa hadapan ('isu kedua'); (c) tiada award untuk ganti rugi am untuk kehilangan pendapatan atau kapasiti pendapatan perbicaraan sebelum dan selepas ('isu ketiga'); (d) tiada award untuk ganti rugi khas untuk rawatan perubatan di Dhaka, Bangladesh dan perjalanan ke Malaysia ('isu keempat'). Berkaitan dengan isu pertama, perayu menghujahkan bahawa award sebanyak RM30,000 terlalu rendah yang mana sepatutnya adalah RM45,000. Untuk isu kedua, perayu menghujahkan bahawa ganti rugi am untuk perbelanjaan perubatan masa hadapan sepatutnya diawardkan sebagai satu perkara prinsip dan logik kerana hakim mahkamah sesyen yang bijaksana ('HMS') telah mengawarkan tuntutan untuk kesakitan dan penderitaan untuk pembedahan masa depan untuk membuang implan. Berkaitan dengan isu ketiga, responden menghujahkan bahawa perayu telah gagal mengemukakan bukti dokumentasi yang mencukupi mengenai permit kerjanya pada masa yang material kemalangan itu sedangkan perayu mengemukakan bahawa dia bekerja di Malaysia dengan permit kerja yang sah. Selanjutnya, perayu menghujahkan bahawa gaji puratanya untuk tiga bulan terakhir sebelum kemalangan adalah RM2,926 termasuk kerja lebih masa dan elaun. Akhir sekali, berkaitan dengan isu keempat, perayu menghujahkan bahawa HMS menafikan award ganti rugi khas untuk rawatan perubatannya di Dhaka, Bangladesh dan perjalanan ke Malaysia.

Diputuskan, membenarkan sebahagian rayuan dengan kos RM6,000:

(1) Berkaitan dengan isu pertama, mahkamah mendapati bahawa award sebanyak RM30,000 dalam keadaan itu terutamanya memandangkan sifat patah serta kecacatan berbangkit tidak jelas rendah berdasarkan ujian litmus baik untuk mewajarkan campur tangan rayuan (lihat perenggan 12).

(2) Untuk isu kedua, mahkamah bersetuju dengan hujahan perayu dan menyimpulkan bahawa HMS semestinya telah terlepas pandang dengan tidak mengawardkannya. Akibatnya, campur tangan rayuan telah diwajarkan di sini, dan mahkamah selanjutnya mendapati bahawa

RM8,000 adalah ganti rugi adil dan munasabah (lihat perenggan 14). A

(3) HMS telah terkhilaf apabila mendapati bahawa perayu telah diambil bekerja secara haram tanpa permit bekerja yang sah. Memandangkan permit dinyatakan sebagai 'extended' dan tidak 'issued', ia semestinya bermakna bahawa perayu mempunyai permit kerja yang sah sebelumnya, dan ini telah disokong oleh keterangan majikannya (lihat perenggan 19). B

(4) HMS telah dengan sewajarnya mengira pampasan untuk kehilangan pendapatan pada RM1,090 x 136 = RM148,240 tetapi mahkamah mendapati bahawa pengiraan tersebut adalah salah kerana ia sepatutnya telah dilakukan dalam dua bahagian. Bahagian pertama adalah kehilangan sebenar perolehan perayu dan bahagian kedua adalah kehilangan keupayaan pendapatan masa depannya. Pengiraan untuk bahagian pertama sepatutnya selama sepuluh bulan dari Julai 2015–Mei 2016. Memandangkan perayu telah dibayar gaji sebulan seperti yang diakui olehnya, pengganda oleh itu adalah untuk sembilan bulan. Gandaan yang sepatutnya menjadi RM2,926. Oleh itu, mahkamah mengawardkan RM26,334 untuk kehilangan pendapatan. Bagi kehilangan keupayaan pendapatan, telah menjadi amalan mahkamah untuk membuat award sekaligus, terutamanya apabila terdapat ketidakpastian yang wujud mengenai prospek pekerjaan masa depan plaintif. Maka mahkamah mengawardkan RM100,000 untuk kehilangan keupayaan pendapatan (lihat perenggan 20–21). C D E

(5) Penerimaan keterangan atau selainnya disebabkan oleh pengeluaran lewat adalah mengikut budi bicara hakim perbicaraan secara prosiding dan mahkamah rayuan tidak akan mengganggu pelaksanaan budi bicara itu kecuali dengan jelas salah. Dalam hal ini, ia mestilah keputusan oleh HMS berdasarkan prasangka relatif kepada pihak-pihak dan mahkamah mendapati bahawa keputusan muktamadnya tidak benar-benar salah. Di samping itu, dokumen asal yang membentuk bukti dokumen itu tidak dikemukakan dalam saman itu dan pembuat dokumen tersebut juga tidak dipanggil. Selain itu, tidak ada penjelasan yang diberikan untuk mewajarkan tiada pengeluaran mereka. Justeru, ia adalah betul untuk HMS enggan menerima mereka sebagai keterangan. Tuntutan perayu berkenaan isu keempat adalah tanpa merit dan ditolak dengan betul (lihat perenggan 23 & 25–26).] F G H

Notes

For a case on appeal, see 6(3) *Mallal's Digest* (5th Ed, 2015) para 2090. I

Cases referred to

Awang bin Mat & Anor v Marimuthu a/l N Krishnan & Anor [2015] 1 PIR [15] 142 (refd)

Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v

A *Government of Malaysia & Anor* [1994] 1 MLJ 394, SC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Ishem bin Borhan v Nurul Afizan bt Zailis (Mohamad bin Ali — Third Party [2014] 1 PIR [39] 372 (refd)
B *Mohd Roslan bin Abdul Razak (seorang budak di bawah umur mendakwa malalui wakil litigasi dan ibunya, Rokiah Bebee binti Pitchay, plaintif kedua) & Anor v Jagathisan a/l Arumugam* [2017] 1 PIR [9] 70 (refd)
Mohd Zuhari b Dahalan & 2 Ors v Razali b Abdul Rashid [2013] 1 PIR [32] 277 (refd)
C *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153; [1985] CLJ Rep 236; [1985] 2 CLJ 221, FC (refd)
Sanjiswaran a/l Thamppiraja v Abdul Ghafar bin Abdul Ghani & Anor [2016] 2 PIR [53] 499 (refd)
D *Tan Minn Gen (sebagai bapa dan sahabat wakil diri bagi kedua-dua anak, Tan Zhi Ying dan Tan Hon Sheng, yang belum capai umur dewasa) & 2 Ors v Samsuri bin Sulati* [2015] 2 PIR [38] 313 (refd)

Legislation referred to

E Evidence Act 1950 s 73A

Baldev Bhar (Sykt Baldev Bhar) for the appellant.
Amanina Farhana (Zaid Ibrahim & Co) for the respondents.

F **Lim Chong Fong J:**

INTRODUCTION

[1] This is an appeal against the quantum of damages awarded by the G sessions court in respect of a road accident.

[2] The sppellant is an individual of Bangladesh nationality and the plaintiff in sessions court Suit No PA-A53KJ-100–08 of 2016 ('suit').

H **[3]** The first respondent is an individual whilst the second respondent is a private limited company and they were the first defendant and second defendant respectively in the suit. The second respondent is the owner of the taxi bearing registration No HP 2700 ('taxi').

I PRELIMINARY AND BRIEF FACTS

[4] On 11 July 2015, there was a collision between motorcycle ridden by the appellant and the taxi driven by the first respondent on Jalan Sultan Azlan Shah, Penang. As the result, the appellant suffered serious personal injuries.

[5] The appellant on 29 February 2016 filed the suit and the sessions court on 22 November 2017 entered judgment in favour of the appellant.

[6] The appellant was dissatisfied over several heads of award of general and special damages by the sessions court and hence filed his appeal to the High Court on 22 November 2017.

[7] The appeal came before me and after having read the appeal record and written submissions filed by the parties, I heard oral arguments of counsel on 16 May 2018 and 5 June 2018. I thereafter adjourned the matter for deliberation.

[8] Now having done so, I hereby furnish below my decision together with the supporting grounds.

CONTENTIONS AND FINDINGS

[9] There were basically four issues raised by the appellant, viz:

(a) under-award of general damages for closed fracture right medical malleolus and right distal 1/3 fibula;

(b) non-award of general damages for future medical expenses;

(c) non-award of general damages for pre trial and post trial loss of earning or earning capacity; and

(d) non-award of special damages for medical treatment in Dhaka, Bangladesh and travelling to Malaysia.

[10] The law on appeal in respect of quantum of awards is trite. In *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153; [1985] CLJ Rep 236; [1985] 2 CLJ 221 (FC), Hashim Yeop Sani FJ (later CJ (Malaya)) held as follows:

> It is however long been settled that where a trial judge has erred in the 'direction of being too generous' that would not by itself constitute a matter to be appeal from (*Pahang Lim Siong Motor Co & Anor v Cheong Swee Khai & Anor*). In *Plywood & Sawmill Ltd v Lock Ngan Loi* Gill FJ (as he then was) explained the principle clearly when he said:
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> > The general principle is that an appellate court can only interfere with an assessment if it is considered inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which has been awarded — that sum must be altered', or it is so much out of line with the discernable trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

In such assessment therein generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate court is always slow to reverse the trial judge's decision on such assessment unless there are strong grounds for interference. The Federal Court in *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* following Lord Wright's judgment in *Powell Duffryn Associated Collieries Ltd* at pp 616–617 again stressed that it not enough that there is a balance of opinion or preference. 'The scale must go down heavily against the figure attacked if the appellate court is to interfere whether on the ground of excess or insufficiency'.

[11] The learned sessions court judge awarded RM30,000 general damages for closed fracture right medical malleolus and right distal 1/3 fibula. He was cognisant that the appellant suffered resultant ankle stiffness which caused him weakness, degenerative changes as well as difficulty to squat, run and climb stairs. The appellant however contended that the award is too low which ought instead to be RM45,000 whereas the respondents contended that the award was appropriate and fair.

[12] The range of previous awards is between RM15,000 to RM35,000 following *Ishem bin Borhan v Nurul Afizan bt Zailis (Mohamad bin Ali — Third Party* [2014] 1 PIR [39] 372; *Tan Minn Gen (sebagai bapa dan sahabat wakil diri bagi kedua-dua anak, Tan Zhi Ying dan Tan Hon Sheng, yang belum capai umur dewasa) & 2 Ors v Samsuri bin Sulati* [2015] 2 PIR [38] 313; *Mohd Zuhari b Dahalan & 2 Ors v Razali b Abdul Rashid* [2013] 1 PIR [32] 277; and *Mohd Roslan bin Abdul Razak (seorang budak di bawah umur mendakwa malalui wakil litigasi dan ibunya, Rokiah Bebee binti Pitchay, plaintif kedua) & Anor v Jagathisan a/l Arumugam* [2017] 1 PIR [9] 70. They were made known and duly considered by the learned sessions judge. Upon my review, I do not think that the award of RM30,000 in the circumstances particularly in view of the nature of the fracture as well as consequential disability is manifestly low based on the good gracious litmus test to warrant appellate intervention.

[13] Next as to the non-award of general damages for future medical expenses, the appellant primarily contended that it must be awarded as a matter of principle and logic because the learned sessions court judge actually awarded the claim for pain and suffering for the future operation to remove the implant. Accordingly, the appellant submitted that the sum of RM8,000 is fair and reasonable particularly since the appellant is a foreigner and would not be subsidised even if the procedure is carried out in a Malaysian Government hospital. Reference was made to the case of *Awang bin Mat & Anor v Marimuthu a/l N Krishnan & Anor* [2015] 1 PIR [15] 142. I noted that the respondents did not seriously challenge this issue.

[14] I am in agreement with the appellant's submission and conclude that the learned sessions court judge must have overlooked by not awarding it.

Consequently appellate intervention is warranted here and I find that RM8,000 is a fair and reasonable compensation.

[15] Moving on to the non-award of general damages for pre trial and post trial loss of earning or alternatively earning capacity in the way as couched by the appellant before me, the learned sessions court judge held as follows in his grounds of judgment:

> [36] The learned defendant counsel submitted since the plaintiff had not pleaded for this loss in his statement of claim, the Court ought to summarily dismiss this claim. However the Federal Court in the case of *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 held that:
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> > (3) Both loss of future earnings and loss of earning capacity are items of general damages which need not be specifically pleaded. It was sufficient for the respondent to aver 'And the Plaintiff prays for general damages' in his pleadings.
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> [37] As such I am duty bound to assess this claim. However since I already hold that plaintiff has failed to proof that the source of his income is legal, the issue of future income is redundant.
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> [38] Apart from that, evidence form SP1 clearly showed that Plaintiff was never asked to resign or to leave his current employment. In fact he had returned to the company and was given a light job. However he choose to return to Bangladesh in February 2016 and failed to return 3 months thereafter which resulted his termination. Thus, he is not entitled to claim for loss of future income.
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> [39] In any event, if I am wrong to hold such view, I assessed the plaintiff loss of future income as follows:
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> > 55 - 31 (plaintiff age at the time of accident) = 24 divided 2 = 12 purchase years or 144 month (minus 8 month) = 136 months
> >
> > RM1090.00 x 136 = RM148,240.00

[16] The respondents strenuously contended that the learned sessions judge was correct in his analysis and decision. It was emphasised that the appellant failed to furnish adequate documentary proof of his work permit at the material time of the accident as well as his salary receipts. In addition, the appellant never returned to work and no reason was afforded for the non return.

[17] The respondents referred to the case of *Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394 (SC) where Peh Swee Chin FCJ held as follows:

> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun* 4; *Burns* 5; *Lebagge* 6 and *Dhlamini* 7 and approve the dictum in question in *Yaakub* 1. We therefore uphold the decision of the learned judge in the court

below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed; because *ex turpi causa non oritur actio* or, in other words, such claim would be against public policy. We would like to emphasise the timely caution of the learned Chief Justice of Singapore in *Ooi* 4, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

[18] The appellant however submitted that he was working in Malaysia at all material times with a valid work permit as testified by SP1 on behalf of his employer Synatic Technology Sdn Bhd and corroborated by his work permit in exh P3. According to the appellant, he was hospitalised in Penang after the accident in July 2015 for three months. He then went back to Bangladesh in October 2015 on three months medical leave for recuperation. He returned to work with his employer in December 2015 but undertook only sedentary sit down tasks because his injured leg had still not fully healed then. He left again for Bangladesh in February 2016 to seek further treatment but he did not return thereafter. No reason was however afforded for his non return to Malaysia. Hence the appellant was terminated by his employer three months later in May 2016. Although the basic salary of the appellant was RM1,090 but the average take home salary of the appellant for the last three months prior to the accident was RM2,926 inclusive of overtime and allowances.

[19] I have reviewed the entire evidence before me and firstly find that the learned sessions court judge had erred by having found that the appellant was illegally employed without a valid work permit. In this respect, I have scrutinised his work permit that was issued on 5 January 2016 in exh P3, amongst others, stated 'Pass *extended* on the condition that the holder does not remain in West Malaysia longer than 27 February 2017'. Since the permit is expressed as 'extended' and not 'issued', it necessarily meant that the appellant had a previous valid work permit and this is corroborated by the testimony of his employer. In the premises, the finding of the learned sessions court judge was plainly wrong and I reverse the findings because he had not judicially appreciated the evidence on this point following *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[20] I am aware that the learned sessions court judge also provisionally computed the compensation for loss of earnings of the appellant at RM1090 x 136 = RM148,240. With respect, the computation is in my opinion erroneous by reason that it should instead have been done in two parts. The first part is his actual loss of earnings in the employment of Synatic Technology Sdn Bhd and the second part is his loss of future earning capacity for only being able to undertake a lower earning job due to his physical disability after cessation of his employment with Synatic Technology Sdn Bhd.

The computation of the compensation for the first part should in my opinion be for ten months from July 2015 to May 2016. Since the appellant has been paid a month of salary by the employer as conceded by him, the multiplier is hence for nine months. The multiplicand should fairly be RM2,926. Consequently, the part for loss of earning is 9 x RM2,926 = RM26,334. As for the other part on loss of earning capacity, I noticed that it has been customary of the courts to make a lump sum award just as in *Sanjiswaran a/l Thamppiraja v Abdul Ghafar bin Abdul Ghani & Anor* [2016] 2 PIR [53] 499 particularly where there is inherent uncertainty on the nature of the future employment prospects of the plaintiff. In that case, a sum of RM100,000 was awarded and I am of the view that the same sum ought to be awarded here too.

[21] Finally, the appellant contended that the learned sessions court judge denied him the award of special damages for his medical treatment in Dhaka, Bangladesh and travelling to Malaysia. This award of special damages is obviously subject to strict proof. The learned judge held as follows in his grounds of judgment:

> [41] ... Item k–n is a costs incurred in Bangladesh. On the trial date 23 October 2017, plaintiff counsel attempted to tender a supplementary bundle of documents consisting plaintiff expenditure in Bangladesh. The defendant counsel objected as it was made at the very last minute and I upheld the objection.
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> [42] This case has been managed for ten times and yet plaintiff choose to introduce such document at the very last minute. He would definitely assist this court and even the defendant's counsel if he had completed his bundle during the case management and/or before trial date. And because of that, I would not allow the producing of the supplementary bundle. Consequently without any documentary evidence the plaintiff claim to all his expenses in Bangladesh would not be allowed.

[22] The reception of evidence or otherwise due to late production is within the discretion of the trial judge procedurally and the appellate court will not interfere with that exercise of the discretion unless it was plainly wrong. In this regard, it must have been a ruling by the learned sessions court judge based on the relative prejudices to the parties and I do not think that his ultimate decision is plainly wrong.

[23] Be that as it may, the substantive criteria for reception of the evidence is stipulated in s 73A of the Evidence Act 1950 which reads:

> 73A Admissibility of documentary evidence in civil cases, etc
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> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> (a) if the maker of the statement either —

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(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

B

(b) if the maker of the statement is called as a witness in the proceedings:

C

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

D

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —

E

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

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(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

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(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

H

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

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(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the

statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

I have reviewed the appeal record particularly the notes of proceedings and witness statement of the appellant but I do not see that the original documents that constituted the documentary evidence sought to be adduced had been tendered in the suit. In addition, the maker(s) of the documents were also not called to admit them at the trial. Alternatively, no explanation was given to justify their non production as well. In the premises, it would also have been correct for the learned sessions court judge to have refused admitting them in evidence any way.

[24] Consequently, this appellant's claim for special damages for his medical treatment in Dhaka, Bangladesh and travelling to Malaysia is without merit and rightly rejected.

CONCLUSION

[25] For the foregoing reasons, I allow the appeal to the extent that I further award the appellant the sum of RM8,000 in general damages for future medical expenses as well as RM126,334 in general damages for loss of earnings and earning capacity together with interest thereon at 5%pa from the date of filing of the suit. The other awards of the sessions court are affirmed and remain intact.

[26] As for costs, the respondents shall pay the appellant the sum of RM6,000.

Appeal allowed in part with costs of RM6,000.

Reported by Dzulqarnain Ab Fatar